ATTACHMENT 8

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

JOINT PETITION FOR ARBITRATION OF NEWSOUTH COMMUNICATIONS CORP., NUVOX COMMUNICATIONS, INC., KMC TELECOM V, INC., KMC TELECOM III LLC, AND XSPEDIUS COMMUNICATIONS, LLC ON BEHALF OF ITS OPERATING SUBSIDIARIES XSPEDIUS MANAGEMENT CO. SWITCHED SERVICES, LLC, XSPEDIUS MANAGEMENT CO. OF LEXINGTON, LLC, AND XSPEDIUS MANAGEMENT CO. OF LOUISVILLE, LLC OF AN INTERCONNECTION AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC. PURSUANT TO SECTION 252(B) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED	)	CASE NO. 2004-00044

O R D E R

NewSouth Communications Corp., NuVox Communications, Inc., and Xspedius Communications, LLC (collectively, "Joint Petitioners")[1] filed with the Commission a joint petition for arbitration seeking resolution of issues between the Joint Petitioners and BellSouth Telecommunications, Inc. ("BellSouth"). On September 26, 2005, the Commission issued an Order addressing the 19 issues which the parties were unable to resolve through negotiation.

[1] KMC Telecom V, Inc. and KMC Telecom III LLC, originally parties to this proceeding, withdrew their request for arbitration on May 31, 2005.

aware that BellSouth is not including this limitation-of-liability language in its agreements with customers, the Joint Petitioners are free to petition this Commission for redress.

ISSUE 6: HOW SHOULD INDIRECT, INCIDENTAL, OR CONSEQUENTIAL DAMAGES BE DEFINED FOR PURPOSES OF THE AGREEMENT?

The Commission initially found it unnecessary to insert into the agreement the Joint Petitioners' proposed language regarding damages to end-users which result from a party's performance. The Joint Petitioners requested rehearing but pointed to no error.

Neither party may affect the rights of a third-party end-user through this interconnection agreement. Accordingly, interested persons who may be affected by the way in which indirect, incidental, or consequential damages are defined may seek redress in courts of general jurisdiction. The language proposed by BellSouth for inclusion in the interconnection agreement should be adopted.

ISSUE 7: WHAT SHOULD THE INDEMNIFICATION OBLIGATIONS OF THE PARTIES BE UNDER THIS AGREEMENT?

Joint Petitioners ask that the Commission reconsider its decision to adopt BellSouth's language regarding indemnification obligations. After review of all arguments presented on rehearing, the Commission finds that reconsideration should be granted. BellSouth, as the providing party, should indemnify the Joint Petitioners as the receiving parties to the extent they become liable due to BellSouth's negligence, gross negligence, or willful misconduct Thus, the Commission finds that the Joint Petitioners' proposal is a commercially reasonable one to the extent that it covers indemnification for negligence, gross negligence, or willful misconduct. The

Commission accordingly reconsiders its earlier decision and holds that the Joint Petitioners should prevail to the extent described herein.

ISSUE 9: SHOULD A COURT OF LAW BE INCLUDED IN THE VENUES AVAILABLE FOR INITIAL DISPUTE RESOLUTION FOR DISPUTES RELATING TO THE INTERPRETATION OR IMPLEMENTATION OF THE INTERCONNECTION AGREEMENT?

The Joint Petitioners ask the Commission to reconsider its determination that disputes arising under interconnection agreements must be brought to this Commission before they proceed to a court of general jurisdiction. The Commission has primary jurisdiction over issues regarding the interpretation and implementation of interconnection agreements. See Verizon Maryland, Inc. v. Public Service Commission of Maryland, 535 U.S. 635, 642 (U.S.S.C. 2002) and BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc., 317 F.3d 1270, 1275 (11th Cir. 2003). BellSouth contends that the Commission should not reconsider its determination because the Commission should resolve disputes between parties that relate to matters normally considered to be within the expertise of the state commission. BellSouth asserts that for matters that lie outside of such regulatory expertise, parties may seek redress in courts of general jurisdiction. The Commission certainly has not attempted, in reaching this outcome, to deprive courts of matters within their jurisdiction. Matters over which this Commission has jurisdiction in the first instance should be addressed by this Commission. The Commission herein denies reconsideration of this issue. The parties should include BellSouth's language in their interconnection agreements.

ISSUE 65: SHOULD BELLSOUTH BE ALLOWED TO CHARGE A CLEC A TRANSIT INTERMEDIARY CHARGE FOR THE TRANSPORT AND TERMINATION OF LOCAL TRANSIT TRAFFIC AND ISP-BOUND TRANSIT TRAFFIC?

BellSouth has sought rehearing of the Commission's determination that the Commission has not been precluded by the FCC from requiring BellSouth to transit traffic under the circumstances requested by the Joint Petitioners. BellSouth contends that it should be authorized to assess Joint Petitioners a transit intermediary charge ("TIC") for transiting traffic in addition to the TELRIC tandem switching and common transport charges that the parties have already agreed will apply. However, BellSouth asserts that it does not have a duty to provide this transit service at TELRIC rates. According to BellSouth, the Joint Petitioners have the option of directly interconnecting with terminating carriers instead of utilizing BellSouth's transit function.[16] BellSouth asserts that it is only obligated to negotiate and arbitrate issues contained in Section 251(b) and (c) and that transit traffic is not so included.

The Joint Petitioners assert that BellSouth has failed to justify the additional TIC rate and, as such, they should be required to pay only amounts previously agreed upon.

The Commission does not find BellSouth's arguments for rehearing to be persuasive. BellSouth has not demonstrated that the Commission is precluded by the FCC from requiring BellSouth to transit traffic. The Commission has previously required third-party transiting by the ILEC based on efficient network use. The Commission will continue to require BellSouth to transit such traffic. Transiting traffic in the

[16] Transcript of Evidence at 141.

circumstances requested by the Joint Petitioners is essential to the provision of service to rural Kentucky.

BellSouth contends that the FCC has recently determined that "Section 251(a)(1) does not address pricing" and, thus, the FCC is seeking comment on appropriate pricing methodologies to apply to transit services.[17] It may be that, during the course of this FCC proceeding, additional light will be shed on appropriate pricing for transit services. However, based on the Commission's previous determinations regarding third-party transiting, and because transiting uses intra-state facilities to provide an intra-state service, the Commission finds that it has jurisdiction over these matters until and unless the FCC specifically preempts the state commission. Accordingly, the Commission's determination is clarified to require BellSouth to provide this transit service at a TELRIC-based rate unless an additional TIC can be justified by BellSouth.

ISSUE 86: HOW SHOULD DISPUTES OVER ALLEGED UNAUTHORIZED ACCESS TO CSR INFORMATION BE HANDLED UNDER THE AGREEMENT?

Regarding how to address disputes over alleged unauthorized access to customer service record ("CSR") information, the Commission determined that BellSouth must seek enforcement of the Joint Petitioners' obligations by filing a complaint with the Commission rather than by discontinuance of access to the CSR information and suspension of service. BellSouth asserts that the Commission misunderstood its position and, thus, did not address this matter correctly. According to BellSouth, the parties agree that disputes regarding unauthorized use of CSR

[17] See In Re Matter of Developing a Unified Intercarrier Compensation Regime, FCC 05-33, CC Docket No. 01-92 at ¶ 132, quoted by BellSouth in a letter filed December 8, 2005.

information must be handled in accordance with the interconnection agreements' dispute resolution provision. However, the Joint Petitioners assert that BellSouth inappropriately fails to include in its agreement the provision that BellSouth will not suspend or terminate service during a dispute regarding access to CSR information. The Commission found that, due to the potential competitive harm which could be realized by discontinuance of access to this CSR information and suspension of service, BellSouth should not be permitted to discontinue without first filing a complaint with the Commission. The Commission affirms this determination and herein requires that BellSouth include language to this effect in its interconnection agreements with the Joint Petitioners. BellSouth has provided no reason why it should be permitted to discontinue access to the CSR information when a legitimate dispute about its use exists between the parties.

ISSUE 88: WHAT RATE SHOULD APPLY FOR SERVICE DATE ADVANCEMENT (A/K/A SERVICE EXPEDITES)?

In addressing what rate should apply for service date advancements (i.e., service expedites), the Commission determined that expedited service was not a Section 251 obligation. The Joint Petitioners contend that expedited service must be provided at TELRIC pricing. BellSouth, on the other hand, argues that the tariffed rate for the service date advancement should apply because BellSouth is not required to expedite service pursuant to the Telecommunications Act. The Joint Petitioners contend that expedited service is part and parcel of UNE provisioning. The Commission disagrees. Standard provisioning intervals for service are required pursuant to Section 251. BellSouth should also provide non-discriminatory access to expedited service, but

expedited service is not a Section 251 obligation. Accordingly, BellSouth's language regarding this issue should be included in the interconnection agreements.

ISSUE 97: WHEN SHOULD PAYMENT OF CHARGES FOR SERVICE BE DUE?

The Joint Petitioners have asked the Commission to reconsider its determination regarding when payment of charges for service should be due. The Joint Petitioners asked for 30 calendar days from receipt of a bill or from the Web posting of a bill, or 30 calendar days from receipt of a corrected or resubmitted bill, before payment would be due. BellSouth counters that payment should be due on or before the next bill date. Though Joint Petitioners have been able to comply with the existing standard,[18] they assert that BellSouth often takes an average of 7 days to deliver bills. BellSouth asserts that the most recently available data shows that it takes 3 or 4 days to deliver its bills.

Given the Joint Petitioners' arguments regarding their difficulties in complying with BellSouth's designated bill due dates, the Commission reconsiders its determination for this issue. In appropriately balancing the issues of timely payment to BellSouth and adequate time to render payment for the Joint Petitioners, the Commission finds that the Joint Petitioners should be permitted 30 calendar days from the issuance of BellSouth's bills before the bills are due. As the Joint Petitioners assert, BellSouth does not dispute that these bills are voluminous and require resources to be dedicated by the Joint Petitioners in order to timely pay them. Accordingly, interconnection agreements between BellSouth and the Joint Petitioners should include language stating that payments for charges for service rendered are due 30 calendar

[18] Transcript of Evidence at 175.

days after BellSouth's issuance of the bills. Issuance should be determined by either the bill's postmark or the Web site posting date.

ISSUE 100: SHOULD CLECS BE REQUIRED TO PAY PAST-DUE AMOUNTS IN ADDITION TO THOSE SPECIFIED IN BELLSOUTH'S NOTICE OF SUSPENSION OR TERMINATION FOR NONPAYMENT IN ORDER TO AVOID SUSPENSION OR TERMINATION?

BellSouth has asked for rehearing of this matter. The dispute between the parties arose from circumstances in which BellSouth calculated a specific past-due amount which it included in an official notice of suspension or termination for non-payment. This same notice also included general language saying that the amount appearing on the notice must be paid and any additional amount that may become past-due on the account in question and all other accounts in order to avoid service termination. The Joint Petitioners argued, and the Commission agreed, that it was inappropriate that the Joint Petitioners' service would be suspended when, in fact, they had paid the exact amount identified in BellSouth's written notice.

BellSouth has presented no new evidence which would cause the Commission to alter its determination. BellSouth must calculate the exact amount due and the date by which the amount must be received in order to avoid suspension of service. If additional past-due amounts accrue, then BellSouth should send a written notice to the CLECs specifying such additional amounts.

ISSUE 101: HOW MANY MONTHS OF BILLING SHOULD BE USED TO DETERMINE THE MAXIMUM AMOUNT OF THE DEPOSIT?

BellSouth has asked for rehearing of the Commission's determination that the maximum deposit should not exceed 1 month's billing for services billed in advance and

2 months' billing for services billed in arrears. BellSouth contends that, even though it had agreed to this maximum deposit amount, it did not dispute the deposit because of other, more stringent terms in that interconnection agreement. However, the basis of the Commission's decision was not merely that BellSouth had agreed to a similar deposit with another carrier. The Commission has looked at the filings of the Joint Petitioners and, weighing the balance, believes that its initial determination for a maximum deposit not to exceed 1 month's billing for services billed in advance and 2 months' billing for services billed in arrears is an appropriate outcome for this arbitration proceeding. The parties have provided, in their petitions for rehearing and responses thereto, differing interpretations of the Commission's determination that BellSouth has a right to request an additional deposit from a Joint Petitioner who fails to meet its payment obligations. Accordingly, the Commission herein clarifies failure to meet payment obligations to mean a failure to timely pay current bills. If the Joint Petitioners fail to timely pay their current bills, BellSouth may recalculate the deposit.

ISSUE 102: SHOULD THE AMOUNT OF THE DEPOSIT BELLSOUTH REQUIRES FROM CLECS BE REDUCED BY PAST-DUE AMOUNTS OWED BY BELLSOUTH TO CLECS?

The Joint Petitioners seek rehearing of the Commission's determination that the issue of the amount owed by a CLEC to BellSouth and the issue of the amount owed by BellSouth to a CLEC are distinct issues. Additionally, the Commission approved BellSouth's proposal that, in the event a deposit is requested of a CLEC, the deposit will be reduced by an amount equal to the undisputed past-due amounts, if any, that BellSouth owes the CLEC. The Joint Petitioners' request for rehearing presents nothing that has not already been considered by the Commission. Accordingly, the original

determination is affirmed. BellSouth's language shall be included in the parties' interconnection agreements.

ISSUE 103: SHOULD BELLSOUTH BE ENTITLED TO TERMINATE SERVICE TO A CLEC IF THE CLEC REFUSES TO REMIT ANY DEPOSIT REQUIRED BY BELLSOUTH WITHIN 30 CALENDAR DAYS?

BellSouth seeks rehearing of the Commission's determination that BellSouth should not be permitted to terminate a CLEC's services when the CLEC has met all of its financial obligations to BellSouth, with the exception of the demand for a deposit. The Commission determined that it is inappropriate for BellSouth to terminate service when a Joint Petitioner has paid all bills except for the request for a deposit. When such disputes arise between BellSouth and a Joint Petitioner, the dispute resolution provision should be invoked.

BellSouth has presented no basis for reconsideration of this decision. If a CLEC refuses to remit any deposit required by BellSouth within 30 calendar days, then either party may seek to resolve the dispute through dispute resolution provisions. The rehearing request presents no new information that has not been previously considered by the Commission. Accordingly, the parties' interconnection agreements shall include the contract language proposed by the Joint Petitioners for this issue.

The Commission HEREBY ORDERS that:

1. The Commission's September 26, 2005 Order is clarified as specified herein.

2. The parties herein shall file their interconnection agreements no later than 30 days from the date of this Order, incorporating the decisions reached herein.

ATTACHMENT 9

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Joint petition by NewSouth Communications Corp., NuVox Communications, Inc., and Xspedius Communications, LLC, on behalf of its operating subsidiaries Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Jacksonville, LLC, for arbitration of certain issues arising in negotiation of interconnection agreement with BellSouth Telecommunications, Inc.	DOCKET NO. 040130-TP ORDER NO. PSC-05-0975-FOF-TP ISSUED: October 11, 2005

The following Commissioners participated in the disposition of this matter:

RUDOLPH "RUDY" BRADLEY
LISA POLAK EDGAR

FINAL ORDER REGARDING PETITION FOR ARBITRATION

BY THE COMMISSION:

APPEARANCES:

NORMAN H. HORTON, Jr., Esquire, Messer, Caparello & Self, P.A., Post Office Box 1876, Tallahassee, Florida 32302-1876; and
JOHN J. HEITMANN, Esquire, STEPHANIE JOYCE, Esquire, and GARRET R. HARGRAVE, Esquire, Kelley Drye & Warren LLP, 1200 19th Street, NW, Suite 500, Washington, DC 20036
On behalf of NewSouth Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III LLC, and Xspedius Communications, LLC, on behalf of its operating subsidiaries Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Jacksonville, LLC. ("JOINT PETITITONERS").

B. ANALYSIS

Upon review of the record and the parties' arguments, we find that there is no need to define these terms in an interconnection agreement. The issue of whether particular damages constitute indirect, incidental or consequential damages is best determined, consistent with applicable precedents, if and when a specific damage claim is presented to us or to a court. We note that third-party claims that solely involve damages would more than likely fall outside our jurisdiction.

For example, in Southern Bell Tel. & Tel. Co. v. Mobile America Corp, the court held, "Nowhere in Ch. 364 is the PSC granted authority to enter an award of money damages (if indicated) for past failures to provide telephone service meeting the statutory standards; this is a judicial function within the jurisdiction of the circuit court pursuant to Art. V, § 5(b), Fla.Const." 291 So.2d 199, 202 (Fla. 1974) In light of this decision, we will not define the aforementioned damages. We have previously held that, "As a general matter, we find that the Commission *has* primary jurisdiction to resolve disputes arising out of interconnection agreements pursuant to Section 364.162, Florida Statutes." See, PSC Order No. PSC-04-0972-TP, issued October 7, 2004. However, in the event a dispute falls outside our jurisdiction or the FCC's jurisdiction, then the claimant may seek relief in a court of competent jurisdiction. In that situation, it would then fall under the review of that court to define the terms based upon the applicable case law.

C. DECISION

Upon review and consideration of the record and the parties' briefs, we shall not define indirect, incidental or consequential damages for purposes of the Agreement. The decision of whether a particular type of damage is indirect, incidental or consequential shall be made, consistent with applicable law, if and when a specific damage claim is presented to this Commission, the FCC or a court of law.

V. INDEMNIFICATION

A. PARTIES' ARGUMENTS

The Joint Petitioners argue that parties must be responsible for damages caused by their own acts or omissions. The Joint Petitioners argue that their proposal provides that the party providing service must indemnify the other party for damages caused as a result of providing those services. They also argue in their brief that their proposal comports with industry practice as reflected in the Joint Petitioners' tariffs and contracts. Joint Petitioner witness Russell testified that, "A party that is negligent should bear the cost of its own mistakes." Joint Petitioner witness Russell also testifies that " . . .in virtually all other commercial-services contexts, the service provider, not the receiving party, bears the more extensive burden on indemnities." Joint Petitioners also argue in their brief that BellSouth witness Blake agrees that the party receiving service should indemnify the party providing service for damages caused by the receiving party's own unlawful conduct. The Joint Petitioners argue in their brief that the

parties' differences are with respect to the instances where the providing party is negligent. Further, the Petitioners claim that BellSouth incorrectly insists the receiving party should indemnify the providing party. Petitioners assert in their briefs that this is backwards, contrary to law and common sense. For example, the Joint Petitioners, cite to Xspedius' tariffs stating that the company does not indemnify customers for damages caused by "the negligent or intentional act or omission of the Customer, its employees, agents, representatives or invitees." The Joint Petitioners conclude that an injured party is entitled to relief from the causing party, and anything else would run contrary to longstanding legal principles.

BellSouth claims in its brief that the Joint Petitioners' position is asymmetrical and only benefits the Joint Petitioners (which is contrary to industry standards). BellSouth argues that "indemnity clauses [are] means for allocating foreseen risks, not as means to induce Parties to insure another against unanticipated and unbounded possibilities." BellSouth responds by arguing that the Joint Petitioners are attempting to change industry standard by requiring the party providing service to indemnify the receiving party for: (1) failure to abide by applicable law or (2) for injuries arising out of or in connection with the Agreement to the extent caused by the providing party's negligence. However, BellSouth argues that under the Joint Petitioners' proposal, the receiving party would only indemnify the providing party "against any claim for libel, slander or invasion of privacy arising from the content of the receiving Party's own communications." BellSouth reasons that under this proposal, BellSouth will have virtually unlimited obligations to the Joint Petitioners, and the Joint Petitioners will have essentially no indemnification obligations to BellSouth. BellSouth fears that if it were sued by a third-party solely resulting from the Joint Petitioners' negligence, then it would have no indemnification rights against the Joint Petitioners. BellSouth also notes that the Joint Petitioners have already insulated their liability through the Joint Petitioners' tariffs. BellSouth also argues that pursuant to the FCC Wireline Bureau decision, it should not have to indemnify the Joint Petitioners.[4] BellSouth cites a Minnesota Arbitration Order[5] supporting the notion that the Petitioners' proposed language would make parties potentially liable for another party's conduct far removed from the ICA. BellSouth also claims that interconnection agreements are not typical commercial agreements and should not be construed as such. Further, BellSouth argues that its UNE rates were not established under the premise that it would have almost unlimited exposure via indemnification language in an interconnection agreement. Therefore, BellSouth reasons that the Joint Petitioners' proposal should be rejected because it does not comply with industry standards.

[4] 17 FCC Rcd 27039, 27382 (FCC 2002)

[5] 2003 WL 22870903 at 17.

B. ANALYSIS

Although we find merit in each of the parties' positions, we hold that a party shall be indemnified, defended and held harmless against claims, loss or damage to the extent reasonably arising from or in connection with the other party's gross negligence or willful misconduct. While both BellSouth's and the Joint Petitioners' arguments are very persuasive, we do not find a compelling reason to deviate from the usual practice of limiting liability through the use of its tariffs. Neither party shall be required to indemnify the other party for claims of negligence. This issue only applies to instances of gross negligence or willful misconduct by a party to the Agreement. We find that the carrier with a contractual relationship with its own customers is in the best position to limit its own liability against that customer in instances other than gross negligence and willful misconduct.

C. DECISION

Upon consideration and review of the parties' briefs and the record, we find that a Party shall be indemnified, defended and held harmless against any claims, loss or damage to the extent reasonably arising from or in connection with the other Party's gross negligence or willful misconduct.

VI. FORUM FOR DISPUTE RESOLUTION

A. PARTIES' ARGUMENTS

The Joint Petitioners argue in their brief that they have a right to resolve disputes in a court of law, and they are not willing to give up that right. The Joint Petitioners also argue in their brief that BellSouth is seeking to limit Petitioners' right to seek relief in court to the extent that the jurisdiction or expertise of the dispute is not in the possession of this Commission or the FCC. Joint Petitioners also argue in their brief that BellSouth witness Blake testified that courts should not hear matters that fall within the jurisdiction of this Commission or FCC. The Joint Petitioners are concerned with BellSouth's witness' generalization contained in Hearing Exhibit 6 that, "there could be some facets that aren't relative to the interpretation or implementation [of an interconnection agreement]" that fall outside agency jurisdiction but "can't think of any specific examples." Thus, the Joint Petitioners argue in their brief that BellSouth's language would in effect deprive the Petitioners of their right to seek adjudication by a court of competent jurisdiction. In addition, the Joint Petitioners argue that the jurisdiction of the courts in Florida is set by Section 1 of the Florida Constitution which holds that "[t]he judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts." Florida Constitution § 1.

Further, Joint Petitioners argue that adjudication in a court of law may be more efficient. The Joint Petitioners are also concerned that BellSouth's position would have the parties litigating before nine different state commissions and the FCC. Joint Petitioners' witness Falvey

testified that this "often is able to force carriers into heavily discounted, non-litigated settlements."

BellSouth argues in its brief that if the dispute is outside the jurisdiction of this Commission or the FCC, then the parties can take the dispute to a court of competent jurisdiction. BellSouth argues in its brief that there can be no question we should resolve matters that are within its expertise and jurisdiction. Specifically, Section 252(e)(1) requires that any interconnection agreement adopted by negotiation or arbitration be submitted to the Commission for approval. As such, BellSouth's position is that state commissions are in the best position to resolve disputes relating to the interpretation and enforcement of the agreement.

In addition, BellSouth points to the Eleventh Circuit decision[6] in its brief as support for its position. BellSouth argues in its brief that this decision used this rationale to find that state commissions have the authority under the Act to interpret interconnection agreements. The language of § 252 persuaded the 11th Circuit that in "granting the public service commissions the power to approve or reject interconnection agreements, Congress intended to include the power to interpret and enforce **in the first instance** and to subject their determination to challenges in the federal courts." Id. (emphasis added) BellSouth also argues in its brief that the Joint Petitioners' language would have us standing by or seeking intervention in a state court proceeding regarding interpretation and enforcement of interconnection agreements that we approved. Further, BellSouth asserts that the Joint Petitioners witness Falvey recognized our authority at the hearing, and conceded that state commissions are experts with respect to a number of issues in the agreement.

Last, BellSouth argues in its brief that the Joint Petitioners' position would not reduce litigation. BellSouth also argues in its brief that its position allows for the possibility of dispute resolution to a single forum, the FCC, to resolve a dispute(s).

B. ANALYSIS

The constitutional guaranty of due process demands that a party may petition a tribunal it deems to have jurisdiction over the claim. See, Black's Law Dictionary, Fifth Edition, p. 449, citing, Di Aaio v. Reid, 132 N.J.L. 17, 37 A.2d. 829, 830. It is our understanding that it would be incumbent on that tribunal to either exercise its jurisdiction, or to determine that it lacks jurisdiction. In light of this constitutional guarantee, we find that no tribunal shall be foreclosed to the Parties, and either Party shall be able to petition this Commission, the FCC or a court of competent jurisdiction.

However, we note that this Commission has primary jurisdiction over most disputes arising out of interconnection agreements, and is in the best position to resolve those disputes. For example, we have previously held that, "As a general matter, we find that the Commission *has* primary jurisdiction to resolve disputes arising out of interconnection agreements pursuant to

[6] See, BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services Inc., 317 F.3d 1270, 1277 (11th Cir. 2003).

Section 364.162, Florida Statutes." See, PSC Order No. PSC-04-0972-TP, issued October 7, 2004. In the event the dispute falls outside this Commission's or the FCC's jurisdiction, such as a claim for third-party damages, then the claimant could file in a court of competent jurisdiction.

We do not find merit in Joint Petitioners' argument that litigating before state commissions would force them into heavily discounted, non-litigated settlements with BellSouth. We find little, if any, efficiency gained in their position. For example, the Joint Petitioners would still have to file a complaint in the state in which they sought relief. We determine the only difference would be that the litigation take place in the court system of a state, rather than in that state's public service commission. Neither party shall be foreclosed in a forum, thus the Agreement will not define a specific forum. However, we strongly note that this Commission has primary jurisdiction over most disputes arising from interconnection agreements.

C. DECISION

Upon consideration and review of the parties' briefs and the record, we find that either party shall be able to file a petition for resolution of a dispute in any available forum. However, we note that this Commission has primary jurisdiction over most disputes arising from interconnection agreements and that a petition filed in an improper forum would ultimately be subject to being dismissed or held in abeyance while we addressed the matters within our jurisdiction.

VII. APPLICABLE LAW

A. PARTIES' ARGUMENTS

The Joint Petitioners argue in their brief that it is undisputed that Georgia law will govern the agreement. Joint Petitioners argue that under Georgia contract law, all laws of general applicability that exist at the time of contracting will apply to the contract unless expressly repudiated via an explicit exception or displaced by conflicting requirements. Id. The Supreme Court of Georgia has held that "[l]aws that exist at the time and place of the making of a contract, enter into and form a part of it . . . and the parties must be presumed to have contracted with reference to such laws and their effect on the subject matter."[7] This comports with the United States Supreme Court holding that "[l]aws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if fully they have been incorporated in its terms . . . "[8] The Joint Petitioners argue that due to this presumption, contracts are deemed to include any tenet of applicable law unless expressly excluded. In short, a "contract may not be construed to contravene a rule of law."[9] The Joint

[7] Magnetic Resonance Plus, In., v. Imaging Systems, Int'l, 273 Ga. 525, 543 S.E.2d 32, 34-35 (2001).

[8] Norfolk and Western Ry. Co. v. American Train Dispatchers' Ass'n, 499 U.Su 117, 130 (1991).

[9] Van Dyck v. Van Dyck, 263 Ga. 161, 429 S.E.2d 914, 916 (1993).

Petitioners claim in their brief that parties could not be expected to expressly include all elements of generally applicable law into one contract. If this were expected, then contracts would result in tens of thousands of pages to the agreement. In conclusion, the Joint Petitioners argue that if BellSouth intends to comply with the law, then incorporating the law of the land should not be a problem.

BellSouth argues that this issue is about providing the parties with certainty in the interconnection agreement as to their respective telecommunications obligations. Specifically, BellSouth's concern is that, without relying on specific provisions, the Joint Petitioners will review a telecommunications rule or order, interpret it in a manner that BellSouth could not have anticipated and claim that such forms the basis of a contractual obligation. As indicated by Hearing Exhibit 7, BellSouth' proposal to address this is to include language in the agreement that,

> to the extent that either Party asserts that an obligation, right or other requirement, **not expressly memorialized herein**, is applicable under this Agreement by virtue of a reference to an FCC or Commission rule or order, or **with respect to substantive telecommunications law only** . . .

In addition, BellSouth argues that the Joint Petitioners concede that the interconnection agreement contains the Parties' interpretation of various FCC rules and decisions. Further, BellSouth argues that the Joint Petitioners agree that Parties should not be able to use the Applicable Law provision to circumvent what the Parties memorialize in this Agreement. Id.

BellSouth also argues that the Joint Petitioners' position - that the law in effect at the time of execution of the agreement is automatically incorporated into the Agreement, unless the Parties expressly agree otherwise – should be rejected. Taken to its logical extreme, the parties would only need a one-page interconnection agreement stating that parties agree to comply with Applicable Law, rather than the 500 page agreement currently in existence. BellSouth cites to the North Carolina Utility Commission's decision which expressly rejected this argument in the context of conducting an EEL audit. See, In re: BellSouth Telecommunications, Inc. v. NewSouth Communications, Corp., Docket No. P-772, Sub 7, *Order Granting Motion for Summary Disposition and Allowing Audit* (Aug. 24, 2004).

B. ANALYSIS

The purpose of an agreement is to create specific obligations to do or not to do a particular thing. We find it is essential to have a document that contains specific terms and conditions. That being said, a provision in the Agreement stating when explicit language would apply, and when it would not, could cause more confusion. While the parties raise arguments over applicable law, we find these arguments are premature. These arguments are more appropriately addressed on a case-by-case basis as disputes arise.

C. DECISION

Upon consideration of the parties' briefs and the record, we find that the Agreement will not explicitly state that all existing state and federal laws, rules, regulations, and decisions apply unless otherwise specifically agreed to by the Parties. A provision including such a statement could be subject to various interpretations in the context of a dispute. Instead, the contract shall be interpreted according to its explicit terms if those terms are clear and unambiguous. If the contract language at issue in a dispute is deemed ambiguous, the terms shall be interpreted in accordance with applicable law governing contract interpretation.

VIII. COMMINGLING

The FCC has reversed its previous prohibition of commingling and defines, within the TRO, the meaning of the term and applicable conditions. The issue here is that BellSouth commits to commingling certain section 271 elements that are required to be provided under section 251(c)(3). However, BellSouth will not commit to commingling section 271 elements that are not required to be unbundled pursuant to section 251(c)(3). In that situation BellSouth will do so only under a commercial agreement; therefore, it asserts this aspect should not be included in a § 252 arbitration proceeding.

A. PARTIES' ARGUMENTS

Joint Petitioners witness Mertz[10] employs the FCC's definition and explanation of commingling to form the basis of his argument. Specifically, commingling means "the connecting, attaching, or otherwise linking of a UNE or a UNE [c]ombination to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services." Witness Mertz expresses that "clearly" the elements BellSouth provides under § 271 are obtained by a method other than unbundling under § 251(c)(3) and thus the Joint Petitioners should be allowed to commingle them. He argues that nothing regarding commingling in the TRO or the errata to the TRO supports BellSouth's position that it is not obligated to commingle § 271 elements with § 251 UNEs. Joint Petitioners witness Mertz also argues that the FCC concluded that § 271 requires Regional Bell Operating Companies, such as BellSouth, "to provide network elements, services, and other offerings, and those obligations operate completely separate and apart from section 251." Witness Mertz continues that BellSouth is incorrect in its interpretation of the commingling rule to the extent that its proposed language "turns the rule on its head."

Joint Petitioners witness Mertz argues that when the FCC issued an errata to paragraph 584 of the TRO, the elimination of the phrase "any network elements unbundled pursuant to section 271" was to "clean up stray language" dealing with the commingling of section 251

[10] Mr. James Mertz adopted all testimony, discovery responses, etc., of Joint Petitioner's witness Ms. Marva Brown Johnson.

ATTACHMENT 10

BEFORE THE TENNESSEE REGULATORY AUTHORITY

EXCERPT OF

TRANSCRIPT OF AUTHORITY CONFERENCE

Monday, April 17, 2006

Reported By:
Patricia W. Smith, RPR, CCR

INDEX

days from now to file the FBOs.

So at some point prior to that they would either be able to negotiate or not and then subsequently file the FBOs within that 30-day window.

And I'll add, the difficulty of this issue -- that this is one of those issues where there was a dispute over the language, if you can remember back. So this is one of the more difficult ones in terms of really getting at it. But I think it helps that we have decided some of the other liability issues here.

DIRECTOR MILLER: Yeah, I would agree with giving them more time. And if we don't have an agreement, then in 30 days receive a final best offer.

And I would caution the parties that we're -- you know, we're going to be limited to the two -- to the two offers. And we're not going to go -- or at least I'm not going to go outside those offers. And I expect them to be explicit and not -- I mean, I think the positions of the parties have been explicit, and I understand.

But if somebody comes back with an offer that's confusing, it's liable not to be considered, so I just want to caution the parties.

CHAIRMAN JONES: Item 7, Issue G-7.

What should the indemnification obligations of the parties be under this agreement?

It is my determination that indemnification must work in both directions and that neither party, with the exception of the liability discussed under Item 5, should be liable for the actions of the other party that result in loss or damages.

BellSouth's primary argument in opposition to the providing party indemnifying the receiving party is that it provides services at TELRIC which do not include the cost of open-ended indemnification. To the extent that BellSouth believes such costs should be included and are currently not included in its TELRIC rates, it may petition the Authority for an adjustment to its rates.

Based on the foregoing, it is my motion that the interconnection agreement contain indemnification language which serves to indemnify either party in the instance that the other party's actions result in loss or damages to the first party, including loss or damages resulting from claims of third parties. And I so move.

DIRECTOR MILLER: Could I trouble you to read that again, read your motion again, because

I --

CHAIRMAN JONES: Sure. That the interconnection agreement contain indemnification language which serves to indemnify either party in the instance that the other party's actions resulted in loss or damages to the first party, including loss or damages resulting from claims of third parties.

DIRECTOR KYLE: Commissioner Jones --

CHAIRMAN JONES: Yes.

DIRECTOR KYLE: -- let me make sure, sir.

Then we're not adopting the language proposed by either of the joint petitioners or BellSouth with your motion?

CHAIRMAN JONES: No. We are actually providing the award based on the -- at least my motion is providing an award based on the record.

DIRECTOR KYLE: I was with -- well, I think I was with you. Let me just go ahead and put it on the record. Commissioner Miller can hear it for the third time.

I find that the interconnection agreement should contain indemnification language which serves to indemnify either party in the instance that the other party's actions resulted in loss or damage to

the first party, including loss or damages resulting from claims of third parties.

Therefore, I would move that we do not adopt the language proposed by the joint petitioners or the language proposed by BellSouth.

Am I differing from you, sir?

DIRECTOR MILLER: No, I think we're all --

DIRECTOR KYLE: I think I'm there with you, unless the last sentence that I just read, that we do not adopt the language proposed by the joint petitioners or the language proposed by BellSouth --

Was I in line with you, sir?

CHAIRMAN JONES: That's consistent with my motion.

DIRECTOR KYLE: All right. Well, with that put on the record, I move and vote yes.

DIRECTOR MILLER: Vote aye.

CHAIRMAN JONES: Issue G-9, a CLEC issue. Should a court of law be included in the venues available for initial dispute resolution for disputes relating to the interpretation or implementation of the interconnection agreement?

It is my opinion that this agency has jurisdiction to interpret and enforce interconnection

agreements entered into pursuant to 47 USC Section 252 and that Congress intended for issues related to the interpretation and enforcement of interconnection agreements to come first to the state commissions.

Nevertheless, this agency should not limit the right of a party to seek relief in a court, whether it be state or federal, that it believes to have jurisdiction to resolve a dispute. Moreover, it is not the place of this agency to define the jurisdiction of state and federal courts. Absent explicit language in the Act providing this agency with exclusive authority to initially resolve the enforcement and/or interpretation issues, the jurisdictional assessment of such authority should be left to the courts.

BellSouth also argues that the Authority has ruled in Docket No. 00-00079 that it should resolve all disputes that arise under an interconnection agreement. It is my opinion that the issue in that docket is distinguishable, as it involved resolution of interconnection issues by an arbitrator, not another branch of government.

Based on the foregoing, I move that courts of law may be included as forums for initial resolution of interconnection agreement disputes,

although such a court may decline to exercise or determine that it lacks jurisdiction. And I so move.

DIRECTOR KYLE: I vote yes.

DIRECTOR MILLER: I hate to trouble you to do this, but could you read the last part of your motion?

CHAIRMAN JONES: Okay. It is my opinion that the issue in the Docket 00-00079 is distinguishable, as it involved resolution of interconnection issues by an arbitrator, not another branch of government.

Based on the foregoing, I move that courts of law may be included as forums for initial resolution of interconnection agreement disputes, although such a court may decline to exercise or determine that it lacks jurisdiction.

DIRECTOR MILLER: I vote aye.

CHAIRMAN JONES: Issue G-12. Should the agreement explicitly state that all existing state and federal laws, rules, regulations, and decisions apply unless otherwise specifically agreed to by the parties?

The adoption of joint petitioners' position would add nothing to the meaning of the agreement, given their position that the language

merely memorializes the tenets of Georgia contract law which apply to the agreement through other provisions. Moreover, the language would do nothing to expedite the resolution of a dispute as to whether an obligation exists. BellSouth's language is preferable in this regard. Nevertheless, BellSouth's language unnecessarily limits relief to prospective relief starting upon amendment of the agreement. Such a timing determination should be made during the negotiations between the parties or at the time a dispute is resolved.

Therefore, I move that the agreement should not explicitly state that all existing state and federal laws, regulations, and decisions apply unless otherwise specifically agreed to by the parties.

In addition, I move that absent mutual agreement to the contrary any language limiting relief to prospective only be removed.

DIRECTOR KYLE: Second and vote aye.

DIRECTOR MILLER: Vote aye.

CHAIRMAN JONES: How should line conditioning -- Issue 2-18A. How should line conditioning be defined in the agreement? What should BellSouth's obligations be with respect to line conditioning?

DIRECTOR MILLER: Can we move this to the heel and let me get my staff to check something out?

CHAIRMAN JONES: Absolutely.

(Pause in proceedings.)

DIRECTOR MILLER: You can go ahead, Mr. Chairman.

CHAIRMAN JONES: Issue 3-6. Should BellSouth be allowed to charge the CLEC a Tandem Intermediary Charge (TIC) for the transport and termination of local transit traffic and ISP-bound transit traffic?

As a preliminary matter, BellSouth argues that the Authority has no jurisdiction over this issue because transit service is not a 251 obligation. Regardless of the classification of the service, it is my opinion that the issue is properly before the arbitrators, as the record is clear, through statements of both parties, that the provisioning of transit service was the subject of the parties' negotiations and part of the interconnection agreement initially offered to joint petitioners by BellSouth.

The parties have agreed that BellSouth will provide transit services to joint petitioners. All that remains is whether BellSouth should be

permitted to charge a transit intermediary charge in addition to the TELRIC rates charged for tandem switching and transport. And, if so, how should the rate be calculated?

It is my opinion that the services provided in exchange for the TIC are a part of the 251 tandem switching UNE function. Because the tandem switching rate was set using a TELRIC-compliant methodology, to the extent that the costs of providing the TIC services are not already incorporated into the existing tandem switching rate, the TIC rate should also be established using a TELRIC-compliant methodology.

Further, given my reasoning, I also reject BellSouth's argument that the Authority has no jurisdiction over this issue because it is not a 251 obligation.

Based on the foregoing, I move that: One, Item 65 is appropriate for arbitration; two, BellSouth should be allowed to charge a TIC for transiting tandem traffic; and, three, the TIC should be priced at TELRIC-based rates; four, within 30 days of today, BellSouth should submit a TELRIC cost study for the TIC, to be filed in a newly created docket; and, five, BellSouth should charge as an interim rate,

CHAIRMAN JONES: That's okay.

DIRECTOR MILLER: In the same time frame as we set for the other final best offer.

CHAIRMAN JONES: Yes, I would agree.

DIRECTOR MILLER: And, you know, they can certainly come back with a negotiated rate if they want to. Otherwise, we want a final best offer.

CHAIRMAN JONES: Thirty days from today's deliberations.

Item Number 86, Issue 6-3B. How should disputes over alleged unauthorized access to CSR information be handled under the agreement?

This issue involves a determination as to whether a party may terminate, refuse, or suspend access to certain services as a result of the other party's alleged unauthorized access to CSR information.

It is my opinion that neither party may take such action absent recourse to the dispute resolution process. BellSouth insists on having the ability to terminate, refuse, or suspend access initially with the burden on the other party to initiate the dispute resolution process. Thus, BellSouth does not have a problem with the use of the dispute resolution process. It simply does not want to have to initiate it when it is of the opinion that the

joint petitioners have improperly accessed CSR information.

Because of the severity of the remedy proposed by BellSouth and the fact that this issue involves alleged misconduct, the parties seeking to terminate, refuse, or suspend access for alleged unauthorized access to CSR information should use the dispute resolution process before terminating, refusing, or suspending access.

Further, I am of the opinion that it is reasonable to provide the responding party 30 days within which to answer the allegation.

Lastly, consistent with my earlier decision, the parties may take a dispute to the courts. Therefore, I move that we rule in favor of the joint petitioners and not allow BellSouth to terminate, refuse, or suspend access to services upon the unanswered allegation of misuse of CSR information.

Allegations of misuse should be answered within 30 days, and the party may avail itself of the court system to resolve such disputes.

DIRECTOR MILLER: Second and vote aye.

DIRECTOR KYLE: Vote aye.

CHAIRMAN JONES: Item Number 88, Issue 6-5. What rate should apply for service date

payment should be due on or before the next established regular bill date.

DIRECTOR MILLER: I'm going to second Director Kyle's motion and vote aye.

CHAIRMAN JONES: Item 100, Issue 7-6. Should CLECs be required to pay past-due amounts in addition to those specified in BellSouth's notice of suspension or termination for nonpayment in order to avoid suspension or termination?

It is my opinion, after having reviewed the record, that there are simply too many contingencies that could alter the amount due to BellSouth to find in favor of BellSouth on this issue. Joint petitioners should be required to pay only those undisputed past-due amounts specified in the notice of suspension or termination for nonpayment in order to avoid suspension or termination of service. And I so move.

DIRECTOR KYLE: I may be with you, but let me say it this way. I find that the CLECs have to make timely payments for wholesale services. I believe once they are behind, they should pay all past-due amounts to avoid suspension, absent an order from the Authority. That would be my motion. I so move.

DIRECTOR MILLER: Can I hear yours

again?

CHAIRMAN JONES: Joint petitioners should be required to pay only those undisputed, past-due amounts specified in the notice of suspension or termination for nonpayment in order to avoid suspension or termination of service.

DIRECTOR MILLER: That's what you said, wasn't it?

DIRECTOR KYLE: I said that the CLECs have to make timely payments for wholesale services. And I believe once they are behind, they should pay all past-due amounts to avoid suspension, absent an order from the Authority. Otherwise, all of them could be disputed.

DIRECTOR MILLER: I second the Chair's motion and vote aye.

CHAIRMAN JONES: Item 101, Issue 7-7. How many months of billing should be used to determine the maximum amount of the deposit?

Three alternatives have been proposed to resolve this issue. The joint petitioners suggest: One, that the Authority adopt the maximum deposit requirements in DeltaCom's interconnection agreement; or, two, that the Authority adopt a one-and-one-half-month requirement for them and a

BellSouth to CLECs?

It is my opinion that BellSouth should not be required to reduce the deposit amount by billed amounts that are past due, because such a requirement fails to take into account the reasoning behind requiring a deposit, that is, ensuring against nonpayment by the depositing party.

Moreover, joint petitioners' position is overly broad, because it fails to deduct the amount of any disputed bills. Therefore, I move that deposits should not be lowered by the past-due amounts owed by BellSouth to CLECs.

DIRECTOR KYLE: Second.

DIRECTOR MILLER: Vote aye.

CHAIRMAN JONES: Item Number 103, Issue 7-9. Should BellSouth be entitled to terminate service to CLECs pursuant to the process for termination due to nonpayment if CLECs refuse to remit any deposit required by BellSouth within 30 calendar days?

Consistent with my decision on Item Number 86, it is my opinion that termination of service is a remedy of such severity that it should not be exercised unilaterally when a carrier fails to pay or dispute a deposit requirement within 30 days. Although

it is reasonable to require a party to pay or dispute a deposit requirement within 30 days, failure to do so should result in use of the dispute resolution process, not unilateral termination of service.

Therefore, it is my motion that the panel conclude that BellSouth is not entitled to terminate service to joint petitioners if a joint petitioner refuses to remit any deposit required by BellSouth within 30 calendar days. Joint petitioners must remit the requested deposit or dispute such request within 30 calendar days, and BellSouth should follow the dispute resolution process before terminating service.

DIRECTOR MILLER: I second and vote aye, unless you've got an alternative.

DIRECTOR KYLE: Well, I don't know if I do or not. I couldn't quite follow where his motion was and what his speech was.

But my motion would be I find that deposits constitute amounts owed under these agreements, and, accordingly, failure to pay a deposit within 30 calendar days shall trigger the same termination remedies as other instances of failure to pay.

Now, that would be my recommendation.

And if it's in line, that's great -- if we're on the same page. If not, that's my motion.

DIRECTOR MILLER: I think the Chairman's motion was to follow the dispute resolution provisions in the interconnection agreement. And I second that and vote aye, unless somebody corrects me --

CHAIRMAN JONES: That was correct.

DIRECTOR MILLER: -- and tells me I was --

CHAIRMAN JONES: No, that's correct. Next item, Madam Clerk.

DIRECTOR KYLE: Do we need to go back to one?

DIRECTOR MILLER: Yes, we need to go back to --

CHAIRMAN JONES: Item Number 51, Issue 2-33(b).

DIRECTOR MILLER: I agree with Director Kyle that our recommendation here should be consistent with the hearing officer's recommendation in 02-01203, except here the parties have agreed to a 30-day notice. And since they have agreed, we should accept it. So I second the original motion and vote aye.